UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GOLDSTEIN DEVELOPMENT CORP., Appellant, -against- BERLIN & DENMAR DISTRIBUTORS, INC., Debtor/Appellee.	Case No. 14-cv-05749 (LGS) Bankruptcy Case No. 10-15519 (SMB) Adv. Pro No. 13-01315

DEBTOR/APPELLE'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS THE APPEAL

ROBINSON BROG LEINWAND
GREENE GENOVESE & GLUCK, P.C.
875 Third Avenue, 9th Floor
New York, NY 10022-0123
(212) 603-6300
Attorneys for Debtor-Appellee

TABLE OF CONTENTS

STATEMENT OF FACTS 1
ARGUMENT 2
POINT I 2
DEFENDANT HAS FAILED TO TIMELY FILE ITS BRIEF ON APPEAL 2
A. Defendant Failed to Comply with Bankruptcy Rule 8009(a)(1) 2
B. Goldstein's Appeal Should be Dismissed Pursuant to Fed. R. Civ. P. 41(b) 3
CONCLUSION 6

TABLE OF AUTHORITIES

Page(s)

CASES

Chapter 7 Trustee v. Michalek (In re Michalek),
1996 U.S. App. LEXIS 31261 (2d Cir. Dec. 5, 1996) ... 3

First Nat'l Bank v. Markoff,
70 B.R. 264 (S.D.N.Y. 1987) ... 3

Futterman v. Zurich Capital Corp. (In re Futterman),
2001 U.S. Dist. LEXIS 3177 (S.D.N.Y. March 21, 2001) ... 2, 3

Sanders v. Does,
2008 U.S. Dist. LEXIS 40515 (S.D.N.Y. May 15, 2008) ... 4

RULES

Federal Rule of Bankruptcy Procedure 8009(a)(1) ... 1, 2, 5

Federal Rule of Civil Procedure 41(b) ... 3

Debtor/Appellee Berlin & Denmar Distributors, Inc. ("Berlin") respectfully submits this memorandum of law in support of its motion to dismiss the appeal of appellant Goldstein Development Corp. ("Goldstein") with prejudice for Goldstein's failure to timely file its brief on appeal in violation of Rule 8009(a)(1) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and pursuant to Rule 41(b) of the Federal Rules of Civil Procedure ("Fed. R. Civ. P.") for failing to comply with this Court's Order made on the record at the conference held on August 12, 2014.

STATEMENT OF FACTS

The underlying adversary proceeding was commenced by Berlin on March 29, 2013 based upon Goldstein's unilateral repudiation of its offer to purchase Berlin's property in Berlin's bankruptcy proceedings. (Rich Decl. ¶ 7.) By decision and order dated May 23, 2014, the Hon. Stuart M. Bernstein granted Berlin's motion for summary judgment on its claims. (*Id.*) On July 28, 2014, Goldstein filed its notice of appeal of Judge Bernstein's May 23, 2014 decision and order (Docket # 1.)

On July 29, 2014, this Court issued a scheduling order, which required Goldstein to: (i) timely file its brief on appeal pursuant to Federal Rule of Bankruptcy Procedure 8009(a)(1) (which time expired on August 11, 2014) and; (ii) furnish the Court with a copy of the underlying decision and order on appeal within forty-eight hours of the initial conference, which was scheduled for August 12, 2014 (Docket # 4.) Goldstein failed to meet either of those requirements, which this Court acknowledged at the August 12, 2014 conference on the record. Rather than dismiss the appeal at the conference, this Court granted Goldstein a one day extension in which to serve and file its brief on appeal, specifying that Goldstein was to do so by "close of business" that same day (*See* Rich Decl., ¶ 4.)[1] However, as of the present time, Goldstein has failed to file and serve its brief, and has also failed to seek an extension to do so from either Berlin or this Court. (*Id*, ¶ 5.)

As a result, on August 13, 2014, Berlin filed a letter-motion [Docket # 6] to dismiss Goldstein's appeal. Subsequent to the Berlin's filing of the letter-motion, this Court advised counsel for Berlin that its requested relief has to be made by motion. Accordingly, Berlin submits this motion to dismiss Goldstein's appeal for the reasons set forth below.

ARGUMENT

POINT I

DEFENDANT HAS FAILED TO TIMELY FILE ITS BRIEF ON APPEAL

A. Defendant Failed to Comply with Bankruptcy Rule 8009(a)(1)

Pursuant to Bankruptcy Rule 8009(a)(1), unless a court specifies a different time limit, an appellant appealing from an order of the Bankruptcy Court has fourteen (14) days from filing and docketing its notice of appeal to serve and file its brief. However, as previously stated, Goldstein has neither served nor filed its brief on appeal, and has failed to communicate with counsel to Berlin or this Court regarding an extension of same.

Although this Court granted Goldstein a one-day extension to file its brief, Goldstein's failure to comply with the new deadline should result in a dismissal of its appeal for the same reasons that courts in the Second Circuit dismiss appeals for an appellant's failure to comply with Bankruptcy Rule 8009. *See Futterman v. Zurich Capital Corp.* (*In re Futterman*), 2001 U.S. Dist. LEXIS 3177 (S.D.N.Y. March 21, 2001) (appeal dismissed, since appellant inexcusably failed to file its brief within the required time.) In such cases, courts use their

[1] Reference herein to "Rich Decl." shall be to the accompanying Declaration of Jonathan W. Rich, Esq., dated August 15, 2014.

discretion to determine whether dismissal is appropriate in the circumstances, "including where the Appellant has acted in bad faith, negligently, indifferently, or with dilatoriness." *Futterman*, 2001 U.S. Dist. Lexis 3177 at 7-8. In that event, "courts have not hesitated to resort to dismissal." *First Nat'l Bank v. Markoff*, 70 B.R. 264 (S.D.N.Y. 1987) (dismissing appeal from bankruptcy court due to appellant's inexcusable failure to timely file its brief.)

Courts have been even more inclined to dismiss appeals on that basis where, as here, the appellant fails to seek any adjournments or extensions of time from the Court prior to the deadline. *See Markoff*, *supra* ("[i]ts [appellant's] excuse -- that it could not file a brief until it received a transcript of the Bankruptcy hearing -- does not explain why it could not have sought an extension by informing the court of the need for the transcript before it could file its brief.") *Chapter 7 Trustee v. Michalek* (*In re Michalek*), 1996 U.S. App. LEXIS 31261 (2d Cir. Dec. 5, 1996) (dismissing appeal for appellant's failure to timely file brief, especially because, "[a]s a former attorney, Michalek surely knew that he could have requested a continuance or extension from the Court if circumstances prohibited him from completing a brief.") Therefore, based on Goldstein's failure to timely request an extension of the deadline, its appeal should be dismissed.

B. Goldstein's Appeal Should be Dismissed Pursuant to Fed. R. Civ. P. 41(b)

Moreover, Goldstein's appeal should be dismissed because it has also completely failed to comply with this Court's explicit order from the August 12, 2014 conference, which allowed Goldstein one extra day in which to serve and file its brief. Pursuant to Fed. R. Civ. P. 41(b), a court may dismiss a case "[i]f the plaintiff fails to prosecute or to comply with these rules or a court order . . . ." In analyzing whether to dismiss a plaintiff's case pursuant to these rules, a district court must consider five factors: "(1) the duration of the plaintiff's failures, (2) whether plaintiff had received notice that further delays would result in dismissal, (3) whether the defendant is likely to be prejudiced by further delay, (4) whether the district judge has take[n] care to strik[e] the balance between alleviating court calendar congestion and protecting a party's right to due process and a fair chance to be heard . . . and (5) whether the judge has adequately assessed the efficacy of lesser sanctions." *Sanders v. Does*, 2008 U.S. Dist. LEXIS 40515 (S.D.N.Y. May 15, 2008) (dismissing plaintiff's case for, among other things, plaintiff's failure to comply with the Court's orders.)

Here, a brief analysis of these five factors necessitates dismissal of Goldstein's appeal for its failure to comply with this Court's August 12, 2014 order. First, Goldstein's failures to comply with either this Court's or the Bankruptcy Court's orders have been well-documented since the inception of the underlying adversary proceeding in March 2013, which Berlin brought based upon Goldstein's unilateral repudiation of its offer to purchase Berlin's property in the bankruptcy proceeding. (Rich Decl. ¶ 7.) For example, in the adversary proceeding, Goldstein completely failed to respond to Berlin's discovery requests concerning both Berlin's claims and Goldstein's counterclaims, and defaulted by failing to appear at the August 22, 2013 pre-trial conference. (*Id.*, ¶ 8-9.) As a result, the Bankruptcy Court granted Berlin's motion for a default judgment against Goldstein. Goldstein then moved to vacate that default (which was ultimately mooted when Berlin agreed to the relief requested in exchange for a firm trial date), which caused significant delay to Berlin's ability to prosecute its claim and forced Berlin to incur significant additional legal fees. (*Id.*) Given Goldstein's undisputed failure to also comply with this Court's July 29, 2014 Scheduling Order's requirement that Goldstein furnish a copy of the underlying order on appeal within forty-eight hours of the August 12, 2014 conference, it is reasonable to believe that Goldstein will only continue its pattern of failing to comply with this Court's orders as well as the applicable rules of procedure.

The second element – whether the appellant had notice that its disobedience of the order would result in dismissal – has been satisfied because this Court made it quite clear at the August 12, 2014 conference that Goldstein's failure to comply with Bankruptcy Rule 8009 was not insignificant, and that the new deadline for service and filing was to be just one extra day - - August 12, 2014. (Rich Decl. ¶ 4.) Counsel for Goldstein then acknowledged the new deadline and represented that Goldstein's brief would be served and filed accordingly. (*Id.*) However, as previously stated, Goldstein has failed to do so and has made no attempt to seek an adjournment either from counsel to Berlin or, upon information and belief, from this Court.

The third element – prejudice – has also been satisfied. Goldstein's conduct throughout the bankruptcy proceedings has been highly prejudicial to Berlin's ability to prosecute its claims against Goldstein. Moreover, Berlin firmly believes that Goldstein's appeal from the Bankruptcy Court's latest order is completely without merit and has only been commenced as a delay tactic and to make Berlin incur even more legal fees. (*Id.*, ¶ 10.) The same could be said about Goldstein's previous appeal from the Bankruptcy Court before this Court, which, unsurprisingly, was summarily denied.

The foregoing also applies to the fourth element –whether to alleviate the Court's calendar or allow Goldstein to continue with its appeal. To that end, Berlin reiterates that allowing Goldstein to proceed with this appeal will do nothing more than again waste the time and resources of this Court and of Berlin. Regarding the fifth element, Berlin believes that the only appropriate remedy is for dismissal of Goldstein's appeal, but leaves that decision to the discretion of this Court.

CONCLUSION

Based on the foregoing, Berlin's motion to dismiss Goldstein's appeal with prejudice should be granted and this Court should award Berlin such other and further relief as is appropriate under the circumstances.

Dated: New York, New York
August 15, 2014

Respectfully submitted,

ROBINSON BROG LEINWAND GREENE
GENOVESE & GLUCK P.C.

By: /s/ Jonathan W. Rich
Jonathan W. Rich
875 Third Avenue, 9th Floor
New York, NY 10022
T: (212) 603-6300
F: (212) 956-2164
Attorneys for Debtor/Appellee

Neutral
As of: August 15, 2014 3:35 PM EDT

Chapter 7 Trustee v. Michalek (In re Michalek)

United States Court of Appeals for the Second Circuit
December 5, 1996, Decided
95-5070

Reporter: 1996 U.S. App. LEXIS 31261

In Re: JAMES J. MICHALEK, Debtor. CHAPTER 7 TRUSTEE, Plaintiff-Appellee, v. JAMES J. MICHALEK, Defendant-Appellant. JOHN H. RING, III, Trustee.

Notice: [*1] RULES OF THE SECOND CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

Prior History: Appeal from the United States District Court for the Western District of New York (John T. Elfvin, Judge). This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York and was taken on submission.

Disposition: AFFIRMED.

Core Terms

district court, notice, fail to prosecute, exhibits

Case Summary

Procedural Posture

Appellant debtor challenged a judgment from the United States District Court for the Western District of New York, dismissing his appeal for failure to prosecute, claiming his lack of financial resources and receipt of notice were acceptable excuses to justify a two-year delay in activity.

Overview

Appellant debtor sought review of a bankruptcy court judgment entered in favor of appellee trustee, barring a discharge for secreting estate assets. Two years after filing, the district court dismissed the appeal for failure to prosecute after appellant failed to file any response more than one year after the district court's show cause order. Appellant challenged the dismissal on abuse of discretion grounds, claiming that the delays during the proceedings were justifiable because he lacked financial resources to obtain an in forma pauperis (IFP) status and denied receiving a docketing notice because he was in prison. The court found that appellant's conduct showed bad faith because he misrepresented that he applied for IFP status. The court affirmed the dismissal of the appeal because appellant's conduct constituted a pattern of dilatoriness and he offered no acceptable excuse to justify the delay.

Outcome

The judgment dismissing the appeal for failure to prosecute was affirmed because appellant debtor's conduct constituted a pattern of dilatoriness and he offered no acceptable excuse to justify a two-year delay.

LexisNexis® Headnotes

Bankruptcy Law > Procedural Matters > General Overview

Bankruptcy Law > Procedural Matters > Judicial Review > General Overview

Bankruptcy Law > Procedural Matters > Judicial Review > Bankruptcy Appeals Procedures

Bankruptcy Law > ... > Judicial Review > Standards of Review > Abuse of Discretion

Bankruptcy Law > Procedural Matters > Jurisdiction > General Overview

Civil Procedure > Appeals > Dismissal of Appeals > General Overview

HN1 The time limitation imposed by Fed. R. Bankr. P. 8009 is not jurisdictional, and hence the district court is not required automatically to dismiss the appeal of a party who has failed to meet those deadlines. Nonetheless, failure to file a timely brief may result in dismissal of the appeal, and a district court's decision to dismiss will be affirmed unless it has abused its discretion.

Bankruptcy Law > Procedural Matters > Judicial Review > General Overview

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Timing of Appeals

HN2 Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the district court deems appropriate, which may include dismissal of the action. Reversal is warranted only if the district court's decision strikes us as fundamentally wrong, or if it is clear that no reasonable person could concur in the trial court's assessment of the issue under consideration.

Bankruptcy Law > Conversion & Dismissal > Lack of Good Faith

Governments > Courts > Clerks of Court

HN3 Misrepresentation of facts to district court constitutes bad faith conduct sufficient to warrant dismissal.

Civil Procedure > Parties > Pro Se Litigants > General Overview

HN4 Pro se litigants generally are required to inform themselves regarding procedural rules and to comply with them.

Bankruptcy Law > Conversion & Dismissal > Lack of Good Faith

Civil Rights Law > Protection of Rights > Prisoner Rights > Transfers

HN5 The fact that the debtor is incarcerated and occasionally transferred from one facility to another during the bankruptcy period cannot justify his failure to submit any documents to the district court.

Counsel: APPEARING FOR APPELLANT: James Michalek, Montgomery, PA.

APPEARING FOR APPELLEE: Charles W. Getman, Cohen Swados Wright Hanifin Bradford & Brett, Buffalo, N.Y.

Judges: PRESENT: HONORABLE JON O. NEWMAN, Chief Judge. HONORABLE JAMES L. OAKES, HONORABLE RALPH K. WINTER, Circuit Judges.

Opinion

SUMMARY ORDER

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is hereby AFFIRMED.

James J. Michalek appeals *pro se* from the August 22, 1995, judgment of the District Court dismissing his appeal from the March 8, 1993, judgment of the Bankruptcy Court on the ground that Michalek has failed to prosecute his appeal in the District Court. Appellant, a disbarred attorney currently **[*2]** serving a federal prison sentence, contends that the delays during the proceedings were justifiable and that the District Court abused its discretion in ordering dismissal.

Michalek filed a timely notice of appeal in the District Court from the Bankruptcy Court's summary judgment in favor of the Chapter 7 trustee, barring a discharge on the ground that the debtor had secreted, converted, or refused to turn over estate assets. Michalek filed with the clerk of the Bankruptcy Court a designation of the items to be included in the record on appeal. *See* Fed. Bank. R. 8006. On July 21, 1993, the Bankruptcy Court transmitted the record on appeal to the District Court. On July 23, 1993, the District Court sent its docketing notice of Michalek's appeal to all parties, in accordance with Rule 8007. Under Rule 8009(a), Michalek was required to "serve and file a brief within 15 days after entry of the appeal on the docket pursuant to Rule 8007," *i.e.*, by August 9, 1993.

Michalek failed to submit a brief, motion, or anything else to the District Court by that date. Indeed, by June 1994, the District Court still had not received any submission from Michalek. On June 13, 1994, more than **[*3]** ten months after the original deadline, Judge Elfvin ordered Michalek to show cause why his appeal should not be dismissed for failure to prosecute.

On July 8, 1994, Michalek submitted a two-page affidavit and some attached "exhibits" in response. The affidavit is a nearly inscrutable listing of excuses for his failure to prosecute the appeal in the District Court. The exhibits consist of appellant's statement of issues to be presented on appeal, origin-ally due ten days after the filing of the notice of appeal, *see*Fed. Bank. R. 8006, and a skeletal "outline" of his appellate brief, devoid of content. Michalek offered three primary arguments in his submission: (i) he had repeatedly requested permission to proceed *in forma pauperis* ("IFP"), but the Court had failed to accede to his requests; (ii) he will continue with the appeal "upon the receipt or filing by the clerk of the documents as requested by the Debtor"; and (iii) the attached exhibits suffice to illustrate his position on appeal and to show its merit. Michalek's affidavit closed with a request to the Court "to either accept the submission herein or give the debtor 60 days to file the brief . . . ." Michalek submitted **[*4]** no further documents to the District Court.

On August 17, 1995 -- more than two years after the original brief-filing deadline and more than one year after the Court's order to show cause -- the District Judge ruled that Michalek's response to the show cause order was inadequate and dismissed his appeal for failure to prosecute.

HN1 The time limitation imposed by *Rule 8009* is "not juris-dictional, and hence the district court is not required automatically to dismiss the appeal of a party who has failed to meet those deadlines." *In re Tampa Chain Co., 835 F.2d 54, 55 (2d Cir. 1987)*. Nonetheless, "failure to file a timely brief may result in dismissal of the appeal," *Adler v. Bancplus Mortgage Corp., 108 Bankr. 435, 438 (S.D.N.Y. 1989)*, and a district court's "decision to dismiss will be affirmed unless it has abused its discretion." *Tampa Chain, 835 F.2d at 55*; *see*Fed. Bank. R. 8001(a) ("***HN2*** Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the district court . . . deems appropriate, which may include dismissal of the action."). Reversal is "warranted **[*5]** only if the district court's decision 'strikes us as fundamentally wrong,' or if 'it is clear that no reasonable person could concur in the trial court's assessment of the issue under consideration.'" *In re Bluestein & Co., 68 F.3d 1022, 1025 (7th Cir. 1995)* (quoting *Anderson v. United Parcel Service, 915 F.2d 313, 315 (7th Cir. 1990)*). We believe that the District Court correctly found "bad faith, negligence, and indifference" on Michalek's part and did not abuse its discretion in rejecting Michalek's "excuses" and dismissing his appeal. *Tampa Chain., 835 F.2d at 55-56*.

First, in response to Michalek's allegation that his lack of financial resources and inability to obtain IFP status despite repeated requests prevented the prosecution of the appeal, Judge Elfvin noted that there is no indication that Michalek ever applied for IFP status with either the Bankruptcy Court or the District Court. *Cf. In re Fitzsimmons, 920 F.2d 1468, 1471-72 (9th Cir. 1990)* (***HN3*** misrepresentation of facts to district court constitutes bad faith conduct sufficient to warrant dismissal). Second, Judge Elfvin rejected Michalek's excuse that he would continue with the appeal once the record on **[*6]** appeal was filed with the court clerk because this supposedly unfulfilled act was already completed approximately one year before Michalek submitted his affidavit. The docket sheets show that the Bankruptcy Court transmitted the record on appeal to the District Court on July 21, 1993, that the District Court received the record on the same date, and that the District Court sent a docketing notice to all parties on July 23, 1993. Michalek has never denied receiving this notice. Finally, upon independent review of the exhibits attached to Michalek's affidavit, we agree with Judge Elfvin that they were insufficient even to identify Michalek's arguments on appeal, much less to show that they were meritorious.

Other excuses offered in the affidavit were equally unavailing and properly rejected. First, Michalek's *pro se* status cannot justify the two-year delay, *see* *Edwards v. INS, 59 F.3d 5, 8 (2d Cir. 1995)* ***HN4*** ("[*p*]*ro se* litigants generally are required to inform themselves regarding procedural rules and to comply with them."), especially since Michalek practiced law for over twenty years prior to his disbarment and has represented himself in this bankruptcy since its inception. **[*7]** *See* *Lockhart v. Sullivan, 925 F.2d 214, 216 n.1 (7th Cir. 1991)* (*pro se* attorney "not entitled to special treatment"); *Nielsen v. Price, 17 F.3d 1276, 1277 (10th Cir. 1994)*. Moreover, ***HN5*** the fact that Michalek was incarcerated and occasionally transferred from one facility to another during this period cannot justify his failure to submit *any* documents to the District Court. *See* *Snavley v. Redman, 107 F.R.D. 346, 348 (E.D. Mich. 1985)*. As a former attorney, Michalek surely knew that he could have requested a continuance or extension from the Court if circumstances prohibited him from completing a brief. *See* *In re Benhil Shirt Shops, Inc., 82 Bankr. 7, 9 (S.D.N.Y. 1987)*; *First National Bank of Maryland v. Markoff, 70 Bankr. 264, 266 (S.D.N.Y. 1987)*. The District Court's docket sheet shows, however, that the July 1994 affidavit was Michalek's sole submission to that Court between July 1993 and August 1995. The District Court properly found that Michalek failed to show cause for his failure to prosecute the appeal.

Furthermore, the lack of any activity on Michalek's part since July 1994 also justifies the dismissal. In the July 1994 affidavit, Michalek requested **[*8]** the District Court "to either accept the submission herein or give the debtor 60 days to file the brief . . . ." Receiving no response, Michalek inexcusably did nothing in the next twelve months before the District Court dismissed his appeal. Because Michalek "has exhibited a pattern of dilatoriness" throughout these proceedings and has offered no acceptable excuse for his delays, *Markoff, 70 Bankr. at 265*, the District Court did not abuse its discretion in ordering dismissal.

Positive
As of: August 15, 2014 3:35 PM EDT

Futterman v. Zurich Capital Corp. (In re Futterman)

United States District Court for the Southern District of New York
March 20, 2001, Decided ; March 21, 2001, Filed
99-CV-8793 (DAB)

Reporter: 2001 U.S. Dist. LEXIS 3177; 2001 WL 282716

In re: LEWIS FUTTERMAN, Debtor; LEWIS FUTTERMAN, Plaintiff, -against- ZURICH CAPITAL CORP., Defendant.

Prior History: [*1] ON APPEAL FROM THE BANKRUPTCY COURT. BANKRUPTCY NO. 93 B 43718 (CB).

Disposition: Defendant's motion for entry of order dismissing bankruptcy appeal granted.

Core Terms

failure to file, notice, art work, neglect, motion to dismiss, district court, new counsel

Case Summary

Procedural Posture

Appellant debtor in bankruptcy appealed the order of the United States Bankruptcy Court for the Southern District of New York affirming appellee creditor's claim on appellant's artwork. Appellee moved the district court for dismissal of the appeal for appellant's failure to prosecute the appeal.

Overview

Appellant had engaged new counsel to prosecute the appeal, but had never filed a brief supporting his appeal or a proposed brief in response to the motion to dismiss the appeal. He claimed that he had not received notice of the docketing of the record on appeal, which could constitute excusable neglect for failure to file a brief. The court, however, found this claim was unsupported by the record, and did not suffice to excuse the failure to file a brief upon being served with the instant motion and being urged to do so by appellee's counsel. The delay caused by failure to file a brief was prejudicial to appellee, who had to pay storage costs for some of the artwork in question, while being unable to receive its distribution from the bankruptcy and incurring attorney fees for the instant motion. Thus, the court dismissed the appeal, finding that appellant acted for the sole reason to delay the final judgment, so that he could retain some of the artwork in question.

Outcome

The court granted appellee's motion for entry of an order dismissing appeal for failure to file an appeal brief. Appellant had sufficient notice of the need to file. The delay from failure to file prejudiced appellee. Appellant's purpose was solely to delay final judgment.

LexisNexis® Headnotes

Bankruptcy Law > Procedural Matters > Judicial Review > General Overview

Bankruptcy Law > Procedural Matters > Judicial Review > Bankruptcy Appeals Procedures

HN1 See Fed. R. Bankr. P. 8009(a)(1).

Bankruptcy Law > Procedural Matters > Judicial Review > Bankruptcy Appeals Procedures

Civil Procedure > Appeals > Appellate Briefs

Civil Procedure > Appeals > Dismissal of Appeals > General Overview

Civil Procedure > Appeals > Dismissal of Appeals > Involuntary Dismissals

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN2 Fed. R. App. P. 31 provides that an appellee may move to dismiss an appeal if the appellant fails to file a brief within the allotted time.

Bankruptcy Law > Conversion & Dismissal > Lack of Good Faith

Bankruptcy Law > Procedural Matters > Judicial Review > General Overview

Bankruptcy Law > Procedural Matters > Judicial Review > Jurisdiction

Bankruptcy Law > Procedural Matters > Judicial Review > Bankruptcy Appeals Procedures

Civil Procedure > Appeals > Dismissal of Appeals > General Overview

HN3 Fed. R. Bankr. P. 8009 time limitations are not jurisdictional, and hence, the district court is not required automatically to dismiss the appeal of a party who has failed to meet those deadlines. Instead, where the appellant's failure to file a brief is at issue, the court must use its discretion to determine whether dismissal is appropriate in the circumstances, including where the appellant has acted in bad faith, negligently, indifferently, or with dilatoriness.

Bankruptcy Law > Procedural Matters > Judicial Review > General Overview

Civil Procedure > Appeals > Record on Appeal

HN4 An appellant's failure to receive notice of the docketing of the record on appeal may constitute excusable neglect. However, this argument no longer applies once the appellant learns of the docketing.

Counsel: For LEWIS FUTTERMAN: Harold S. Berzow, Finkel, Goldstein, Berzow, Rosenbloom & Nash, L.L.P., New York, NY.

For ZURICH CAPITAL CO.: Christine H. Black, Robinson, Brog, Leinwand, Greene, Genovese & Gluck, P.C., New York, NY.

For LEWIS FUTTERMAN, debtor: Harold S. Berzow, Finkel, Goldstein, Berzow, Rosenbloom & Nash, L.L.P., New York, NY.

Judges: DEBORAH A. BATTS, UNITED STATES DISTRICT JUDGE.

Opinion by: DEBORAH A. BATTS

Opinion

MEMORANDUM AND ORDER

DEBORAH A. BATTS, United States District Judge.

Defendant Zurich Capital Company (hereinafter "Zurich") moves this court for dismissal of a bankruptcy appeal filed by Lewis Futterman (hereinafter "Appellant"), for Appellant's failure to prosecute the appeal.

For the following reasons, Defendant's motion for entry of an order dismissing the bankruptcy appeal is granted.

I. BACKGROUND

On or about September 14, 1994, Defendant Zurich moved in the Bankruptcy Court of the Southern District of New York for a modification of the automatic stay, in order to allow Zurich to foreclose upon its **[*2]** collateral pieces of artwork held by Appellant. (Black Aff. P 3.) On or about January 6, 1995, the Appellant commenced a proceeding to oppose the motion, claiming that Zurich's secured claim should be expunged on the grounds that the underlying note was usurious. (Black Aff. P 3.) On April 19, 1999, after a trial, the Bankruptcy Court found that Zurich's secured claim should be allowed. Thereafter, on May 28, 1999, the Bankruptcy Court entered its order affirming Zurich's claim on Appellant's artwork. (Black Aff. at Ex. B.)

On June 2, 1999, pursuant to *Rule 8002(c)(2) of the Federal Rules of Bankruptcy Procedure*, Appellant filed for an additional twenty days to file a Notice of Appeal in order to allow him the opportunity to retain alternative counsel. (Black Aff. at Ex. A.) Nevertheless, on June 8, 1999, Appellant's existing counsel before the Bankruptcy Court, Harold S. Berzow (hereinafter "Berzow"), filed the Notice of Appeal. Berzow also filed the Designation of Record on Appeal and Statement of Issues to be

Presented on Appeal (hereinafter "Statement of Appeal") on June 17, 1999. (Black Aff. P5.)

On or about June 17, 1999, Zurich's counsel, Christine Black (hereinafter "Black"), **[*3]** requested the collateral artwork, in accordance with the Appellant's confirmed Plan of Reorganization. (Black Aff. at Ex. B.) Berzow replied by letter dated June 22, 1999, stating that Zurich was not entitled to a distribution until all appeals were decided. (Black Aff. at Ex. C.) That same month, Berzow advised Black that the Appellant was seeking new counsel and that he would not be representing the Appellant in the appeal. (Black Aff. P 6.)

On or about August 10, 1999, the Record on Appeal was transmitted from the Bankruptcy Court to the District Court, notice of which was sent by the Clerk of the Court to both Black and Berzow. (Black Aff. at Ex. D.) On November 29, 1999, Black contacted Berzow to determine the status of the Appellant's brief, which was supposed to be filed pursuant to *Federal Rule of Bankruptcy Procedure 8009*. (Black Aff. P 8.) Berzow again informed Black that he was not Appellant's counsel on the appeal, but stated that he would contact the Appellant to advise him to have his new counsel contact Black. (Black Aff. P 8.)

On December 2, 1999, having received no response from Appellant or any new counsel, Zurich filed the instant motion, seeking dismissal of the **[*4]** bankruptcy appeal on the basis of the Appellant's failure to file his brief and arguing that Zurich has been prejudiced by paying for the storage of the collateral artwork. (Black Aff. P 10.)

By letter dated December 7, 1999, Michael P. Barnes (hereinafter "Barnes") informed this Court that he had been retained as new counsel for the Appellant and stated that after he received the instant motion to dismiss:

> I then called Christine Black, Esq., Zurich's counsel, to suggest that Zurich withdraw its motion and the parties agree on a briefing schedule. Ms. Black declined my suggestion, and suggested instead that I file Mr. Futterman's appeal brief on the return day of the motion.
>
> With all due respect, it does not make much sense for Mr. Futterman to go to the expense of preparing an appeal brief while a motion to dismiss his appeal is pending.

(Letter from Barnes dated Dec. 7, 1999, at 1-2).

On December 17, 1999, Barnes informed the Court that he would be filing an opposition to the motion to dismiss. Thereafter, on December 21, 1999, Appellant filed a two-page affirmation in opposition to the motion to dismiss the appeal. (Futterman Aff. P 1.) He states, in relevant **[*5]** part:

> Specifically, Harold Berzow, of the above firm, requested this past summer that I seek other counsel who might be more familiar with the laws pertaining to usury. I agreed and began the search for a knowledgeable attorney who could most effectively represent me within my budgetary limitations. At the same time, I hired another member of the New York Bar to further research the key issues, in anticipation of finding a suitable litigator. By having a head start on the research, I felt we would be able to file the necessary legal papers in a most thorough and timely manner.
>
> From my conversations with Mr. Berzow, I was functioning under the belief that I would have approximately thirty (30) days from the time the case was docketed to file my brief. I did not receive notice of said docketing, and proceeded under the assumption that

> the above modus operandi was right in line with normal District Court practice. When I retained my current attorney in November of this year, I informed him that we would be working under the above schedule.
>
> When Mr. Berzow officially notified the court and the defendant that he was resigning from the case, he shortly thereafter received **[*6]** a call from Christine Black, of Robinson Brog, the firm representing Zurich Capital Corp. He conveyed to me that he told her that I had retained a new attorney and that she, in turn, had requested hearing from that attorney as to our intentions regarding the case. I communicated this to my new attorney, Michael P. Barnes, who told me he would call her as soon as he had thoroughly familiarized himself with the case and the recent research. Prior to his having that opportunity, Ms. Black filed the motion, which I am now opposing.
>
> As of this point, I have already spent substantial sums on this appeal, including the interim research fee and the retainer for my new attorney. Moreover, the information I have recently received reinforces my original belief that we have a meritorious position.

(Futterman Aff. P 2.)

To date, this Court has not received the Appellant's brief appealing the Bankruptcy Court judgment.

II. DISCUSSION

HN1 Rule 8009 of the Federal Rules of Bankruptcy Procedure provides:

> (a) Briefs. Unless the district court or the bankruptcy appellate panel by local rule or by order excuses the filing of briefs or specifies different time limits: (1) The appellant **[*7]** shall serve and file a brief within 15 days after entry of the appeal on the docket pursuant to Rule 8007.

Fed. R. Bank. P. 8009(a)(1). Rule *8009(a)(1)* is adopted from ***HN2*** Rule 31 *of the Federal Rules of Appellate Procedure*, which provides that an appellee may move to dismiss an appeal if the appellant fails to file a brief within the allotted time. *See* In re *Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson, and Casey, 1995 U.S. Dist. LEXIS 741, 1995 WL 28509*, *2 (S.D.N.Y. 1995); *First National Bank of Maryland v. Markoff, 70 B.R. 264, 265 n.4 (S.D.N.Y. 1987)*.

However, ***HN3*** Rule 8009 time limitations are not jurisdictional, and hence, the "district court is not required automatically to dismiss the appeal of a party who has failed to meet those deadlines." *In re Tampa Chain Co., Inc., 835 F.2d 54, 55 (2d Cir. 1987)*. Instead, where the Appellant's failure to file a brief is at issue, the Court must use its "discretion to determine whether dismissal is appropriate in the circumstances", including where the Appellant has acted in bad faith, negligently, indifferently, or with dilatoriness. *See In re MacInnis, 1998 U.S. Dist. LEXIS 10995, 98Civ. 2894, 1998 WL 409726*, **[*8]** at *3 (S.D.N.Y. 1998); *In re Vega, 1995 U.S. Dist. LEXIS 5701, 93* Civ. 0083, 1995 U.S. WL 254368, at *2 (S.D.N.Y. 1995); *Adler v. Bancplus Mortgage Corp., 108 B.R. 435, 438 (S.D.N.Y. 1989)*; *In re Tampa, 835 F.2d at 55*.

Courts in this District have dismissed appeals for an appellant's complete failure to file a brief, as opposed to a late filing. Compare *In re Vega, 1995 WL 254368* at *2 (holding dismissal appropriate where appellant failed to file appellate brief); *Adler, 108 B.R. at 438* (holding dismissal appropriate where party never filed brief and failure to file was "only the latest in a long series of dilatory tactics"); *First National Bank, 70 B.R. at 265* ("Where a party has exhibited a consistent pattern of dilatoriness throughout a proceeding . . . courts have not hesitated to resort to dismissal.") with In re MacInnis 1998 WL 409726, at *3 (allowing an appeal to move ahead where the brief was filed late and the appellant "has not created a pattern of delay, nor presented unreasonable excuses") and In re Drexel Burnham Lambert Group, Inc., 142 B.R. 633, 636 (S.D.N.Y. 1992) (holding **[*9]** that where the appellant provided excuses for failing to file his brief in a timely manner, late filing alone is not enough to justify dismissal of the case).

Nevertheless, ***HN4*** an appellant's "failure to receive notice of the docketing of the record on appeal . . . may constitute excusable neglect." *See* In re Finley, 1995 WL 28509, at *2. However, this argument no longer applies once the appellant learns of the docketing. *Id.* In this case, the Appellant alleges that he was not aware the case had been docketed by this Court. However, this claim is unsupported by the record and further, does not suffice to excuse the failure to file a brief upon being served with the instant motion on December 2, 1999 and being urged to do so by Zurich's counsel. *See* Barnes' Lttr at 2. The notice of docketing was sent to Berzow, Appellant's attorney of record who filed the Statement of Appeal on August 10, 1999, making the Appellant's brief due on or about September 9, 1999. *See* Black Aff. at Ex. D. Appellant admits that Berzow told him that docketing of the appeal triggered a thirty day period in which the appellate brief was to be filed. *See* Futterman Aff. at P 2. Appellant **[*10]** was thus on notice of the need for vigilance. On or about November 29, 1999, Black called Berzow regarding the brief, a conversation about which Appellant acknowledges having been told. *See* Black Aff. at P 8; Futterman Aff. at P 2. It stretches credulity, that absent any allegations of bad faith on the part of Berzow, that Berzow would relate to Appellant the substance of the conversation with Black regarding the brief while neglecting to mention the docketing. Nevertheless, the least Appellant could have done was to check the status of the transmission of the record with the docketing clerk, or instructed the additional attorney he had hired in the interim between Berzow and Barnes to research "key issues" to do so. *Cf.* In re Finley, 1995 WL 28509, at *2 (finding that failure to check on the status of docketing upon being put on constructive notice was not excusable neglect, since "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect" (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. Partnership, 507 U.S. 380, 113 S. Ct. 1489, 1496, 123 L. Ed. 2d 74 (1993)*)).

The letter sent **[*11]** by Barnes, Appellant's most recent counsel, prior to the submission of Appellant's two-page affirmation, also does not provide any reasonable excuse for the failure to file the brief. Barnes states that he believes it would be more efficient for the Court to decide the appeal before undergoing the expense of filing the brief. *See* Barnes Lttr. at 2. Appellant also implies that this was because he hoped to save money, and that "the information I have recently received reinforces my original belief that we have a meritorious position." *See* Futterman Aff. at P 2.

Since June of 1999, Appellant was on notice that he was going to seek new counsel in order to prosecute this appeal in a timely fashion. Since December, 1999, Appellant has made no effort to file an appellate brief. The two-page Affirmation was an insufficient response; Appellant still has not submitted a proposed brief in response to this motion, nor shown the grounds on which such a brief would be based. This Court can only assume that if the Appellant's arguments had merit, he would be far more anxious to discuss these arguments as grounds for opposing the motion to dismiss. *See* In re Finley, 1995 WL 28509, **[*12]** at *2 ("If the appeal had merit, certainly more could be set forth"). From the record as a whole, it is clear that the sole reason for Appellant's failure to file a brief is to delay the final judgment.

Moreover, the delay caused by Appellant's failure to file his brief has clearly been prejudicial to Zurich. Zurich been paying for the storage costs of some of the collateral artwork while the remainder has remained within the Appellant's custody. *See* Buchbinder Aff. at P 4. Zurich has been unable to receive its distribution, as approved by the Bankruptcy Court, while the Appellant has benefitted by being able to keep the artwork. *See* Black Aff. at P 10. As in *In re Finley*, the delay has also caused prejudice in delaying Zurich's affirmed distribution under the confirmed Plan of Reorganization. *Cf.* *In re Finley, 1995 WL 28509* at *2 ("since the final judgment herein may become unenforceable in whole or in part due to the passage of time, and the creditors may be denied timely distributions from the estate."). Finally, Zurich is prejudiced by incurring attorney fees to file this motion. *Cf. id.*

None of the explanations offered by the Appellant convinces **[*13]** this Court to deny the motion to dismiss. Excusable neglect has not been demonstrated. Instead, the circumstances in this case indicate that the Appellant has sought through his inaction to delay the resolution of his appeal, to the prejudice of Zurich.

III. CONCLUSION.

For the aforementioned reasons, this Court grants the Defendant's motion and the Clerk of the Court is directed to dismiss the Appellant's Bankruptcy Appeal.

SO ORDERED.

DATED: New York, New York

March 20, 2001

DEBORAH A. BATTS

UNITED STATES DISTRICT JUDGE

Positive
As of: August 15, 2014 3:39 PM EDT

Sanders v. Does

United States District Court for the Southern District of New York
May 8, 2008, Decided; May 15, 2008, Filed
No. 05 Civ. 7005 (RJS)

Reporter: 2008 U.S. Dist. LEXIS 40515; 2008 WL 2117261

WILMER P. SANDERS, Plaintiff, -v- JOHN DOES 1-3, OFFICER RUE, AND NEW YORK CITY POLICE DEPARTMENT, Defendants.

Core Terms

amended complaint, duration, failure to prosecute, pro se, notice, district judge, court order

Counsel: [*1] Wilmer P. Sanders, Plaintiff, Pro se, New York, NY.

For New York City Police Department, Defendant: Prathyusha Bandi Reddy, LEAD ATTORNEY, NYC Law Department, Office of the Corporation Counsel, New York, NY.

Judges: RICHARD J. SULLIVAN, UNITED STATES DISTRICT JUDGE.

Opinion by: RICHARD J. SULLIVAN

Opinion

MEMORANDUM AND ORDER

RICHARD J. SULLIVAN, District Judge:

Before the Court is the motion of defendants New York City Police Department ("NYPD") and unidentified NYPD officers, for dismissal of this case for failure to prosecute, pursuant to *Rules 37(b)* and *41(b) of the Federal Rules of Civil Procedure*. For the reasons stated below, defendant's motion is granted and this action is dismissed with prejudice.

I. BACKGROUND

Plaintiff Wilmer Sanders, proceeding *pro se*, filed the complaint in this action on August 5, 2005, alleging claims pursuant to *42 U.S.C. § 1983* against the NYPD and four unidentified NYPD officers. [1] In the complaint, plaintiff alleges that, on the night of June 23, 2005, he was physically assaulted by the officers during the course of his arrest. (Compl. §§ II-III.) On February 10, 2006, the NYPD answered the complaint.

On October 26, 2006, Judge Karas held a teleconference with all parties and later issued an order on October 27, 2006 requiring plaintiff to provide the NYPD with. "information to facilitate the identification of the John Doe Defendants." (October 27, 2006 Order.) The Order further required that defense counsel "make its best efforts to identify the John Doe Defendants in this case." (*Id.*) Further status conferences were held on December 14, 2006, January 19, 2007, and May 18, 2007. [2] At the status conference on May 18, 2007, Judge Karas once again ordered plaintiff to provide defense counsel with identifying information pertaining to the unnamed defendants within two weeks, or by June 1, 2007. (*See* Transcript of May 18,

[1] This case was reassigned from the Honorable Kenneth M. Karas, District Judge, to [*2] the undersigned on September 4, 2007.

[2] In the interim, plaintiff filed several motions, including a motion to disqualify Judge Karas, and motions for a default judgment and cancellation [*3] of the December 14, 2007 conference, which were denied. (*See* January 25, 2007 Order.)

2008 Conference ("May 18 Tr.") at 6.) Judge Karas further ordered that plaintiff would have 60 days after the unknown defendants' identities were turned over to him to file an amended complaint, and scheduled another status conference for September 28, 2007. (*See* May 18, 2007 Order.)

On June 22, 2007, noting that plaintiff had not complied with the May 18, 2007 orders, Judge Karas once again extended the deadline for plaintiff's compliance to July 22, 2007. (*See* June 22, 2007 Order.) The June 22, 2007 order directed the NYPD to provide plaintiff with the identities of the unnamed defendants within thirty days of receiving identifying information from plaintiff. (*Id.*) The order explicitly warned plaintiff that failure to provide this information or to provide an explanation for failing to meet this deadline, "may result in dismissal." (*Id.*)

On August 1, 2007, defendants sent a letter to the Court explaining that plaintiff had provided defendants with certain documents on June 29, 2007, including a motion to disqualify counsel, a document entitled "Motion Description of Defendants," and an amended complaint. (*See* August 1, 2007 Letter from Prathyusha Reddy, Esq. ("Aug. 1 Letter") at 1-2.) However, defendants noted in that letter that these documents did not sufficiently comply with Judge Karas's previous orders because "[o]ther than providing the shift and assignment of Officer Rue, **[*4]** none of the documents plaintiff provided contained any additional identifying information about the John Doe defendants." (*Id.* at 2 (emphasis in original).) Defendants also noted that they had already provided plaintiff with the addresses of each of the officers that responded to the scene of his arrest, but that defendants were unable to provide more specific information without further identifying details from plaintiff about the officers who arrested him. (*Id.*) Counsel provided copies of her correspondence with plaintiff along with this letter. (*See id.*) On August 6, 2007, the Court considered a request from plaintiff for an extension of time to "remail the court ordered information and amended complaint," which the Court denied as moot given the assertions in the Aug. 1 Letter. (*See* August 6, 2007 Order.)

A status conference was held on September 28, 2007 before the undersigned. Plaintiff failed to appear for this conference. [3] On the record at that conference, and in an order dated September 28, 2007, this Court held that, pursuant to earlier orders, plaintiff's deadline for proper filing of the amended complaint was October 1, 2007. (*See* September 28, 2007 Order.) The Court further **[*5]** ordered that, if the amended complaint was not filed by October 1, 2007, defendants should submit a letter to the Court by October 5, 2007 outlining defendants' motion to dismiss the case for failure to prosecute. (*Id.*) The Court also directed plaintiff to respond to the letter-motion by October 10, 2007. (*Id.*) A copy of the Order was mailed to plaintiff at the address he filed with the Court on June 25, 2007, but the envelope was returned to the Court with the note "not deliverable as addressed." (*See* Docket Entry on October 16, 2007.) Defendants submitted their letter-motion on October 5, 2007 as directed; as of the date of this order, almost seven months after the deadline for plaintiff's response, the Court has not received any submission from plaintiff.

On April 3, 2008, the Court issued an order recounting plaintiff's failures to prosecute the case, and notifying plaintiff that the case would be dismissed with prejudice under *Rule 41(b)* if the plaintiff did **[*6]** not submit an explanation for his failure to diligently prosecute this action, and if that explanation was not filed by May 3, 2008. (*See* April 3, 2008 Order at 2.) No submission from plaintiff has been received as of the date of this Opinion.

II. DISCUSSION

[3] It appears that Plaintiff was released from prison in late June 2007, as he filed a *pro se* memorandum on June 25, 2007 indicating a change of address to 2160 First Avenue, # 1103, New York, NY 10029. (*See* May 18 Tr. at 8-10.)

A. Standard of Review

Dismissal with prejudice for lack of prosecution is "'a harsh remedy to be utilized only in extreme situations.'" LeSane v. Hall's Sec. Analyst, Inc., 239 F.3d 206, 209 (2d Cir. 2001) (quoting Theilman v. Rutland Hosp., Inc., 455 F.2d 853, 855 (2d Cir. 1972)). As *pro se* litigants should be given "special leniency regarding procedural matters," the Court must also consider that "notions of simple fairness suggest that a *pro se* litigant should receive an explanation before his or her suit is thrown out of court." *Id.* (quoting Lucas v. Miles, 84 F.3d 532, 535 (2d Cir. 1996)). Nevertheless, Rules 37(b) and 41(b) of the Federal Rules of Civil Procedure give district courts the authority to dismiss cases, on motion or *sua sponte,* where a plaintiff fails to comply with court orders and/or fails to prosecute an action pending in a district court. *See* LeSane, 239 F.3d at 209; Lyell Theatre Corp. v. Loews Corp., 682 F.2d 37, 41-42 (2d Cir. 1982).

1. **[*7]** Rule 37(b)

Rule 37(b), which governs failures to comply with discovery orders, provides that if a party "fails to obey an order to provide or permit discovery . . . the court where the action is pending may issue further just orders" including an order "dismissing the action or proceeding in whole or in part." Fed. R. Civ. Pro. 37(b)(2)(A). Dismissal under Rule 37 requires a finding of "willfulness, bad faith, or any fault" on the part of the party failing to comply with discovery orders. *See Bobal v. Rensselaer Polytechnic Inst.,* 916 F.2d 759, 764 (2d Cir. 1990) (citing Salahuddin v. Harris, 782 F.2d 1127, 1132 (2d Cir. 1986)). The Court must also give notice to the litigant of the consequences of their noncompliance. *See id.* For practical purposes, courts have found that the factors to be addressed in a Rule 41(b) analysis are relevant to an analysis under Rule 37(b), and there is little distinction between the two. *See* Martinez v. E&C Painting, Inc., No. 06 Civ. 5321 (RJH), 2008 U.S. Dist. LEXIS 12832, 2008 WL 482869, at *4 (S.D.N.Y. Feb. 21, 2008) ("[A] plaintiff is obligated to prosecute his lawsuit, and if he fails to do so, dismissal may be warranted under Rule 41(b), the pertinent criteria for which largely **[*8]** parallel those applicable to the Rule 37 analysis."); Banjo v. United States, No. 95 Civ. 633 (DLC), 1996 U.S. Dist. LEXIS 10743, 1996 WL 426364, at *5 (S.D.N.Y. July 29, 1996) ("[I]t is appropriate to be guided by those factors which courts consider before dismissing a case under Rule 41(b) prior to dismissing the case under Rule 37.").

2. Rule 41(b)

Rule 41(b), which governs involuntary dismissal, states that a court may dismiss a case "[i]f the plaintiff fails to prosecute or to comply with these rules or a court order . . . ." Fed. R. Civ. P. 41(b). The rule further states that "[u]nless the dismissal order states otherwise, a dismissal under [Rule 41(b)] . . . operates as an adjudication upon the merits." *Id.*

In analyzing whether to dismiss a plaintiff's case pursuant to these rules, a district court must consider five factors: "(1) the duration of the plaintiff's failures, (2) whether plaintiff had received notice that further delays would result in dismissal, (3) whether the defendant is likely to be prejudiced by further delay, (4) whether the district judge has take[n] care to strik[e] the balance between alleviating court calendar congestion and protecting a party's right to due process and a fair chance **[*9]** to be heard . . . and (5) whether the judge has adequately assessed the efficacy of lesser sanctions." LeSane, 239 F.3d at 209 (quoting Alvarez v. Simmons Mkt. Research Bureau, Inc., 839 F.2d 930, 932 (2d Cir. 1988)) (alterations in original); Martens v. Thomann, 273 F.3d 159, 180 (2d Cir. 2001). "Generally, no one factor is dispositive." Martens, 273 F.3d at 180.

B. Analysis

1. Duration

In applying the first factor, the duration of the failures, the district court should determine "(1) whether the failures to prosecute were those of the plaintiff, and (2) whether these failures were of significant duration." United States ex rel. Drake v. Norden Sys., Inc., 375 F.3d 248, 255 (2d Cir. 2004) (citing Martens., 273 F.3d at 180). The Second Circuit has instructed that failure to prosecute or comply with a court order "can evidence itself either in an action lying dormant with no significant activity to move it or in a pattern of dilatory tactics." Lyell Theatre Corp., 682 F.2d at 43.

Here, plaintiff has repeatedly failed to comply with this Court's orders relating to plaintiff's submission of sufficient identifying information with regard to the unidentified defendants. Defendants appear to **[*10]** have diligently complied with the Court's orders to the extent possible, but have been unable to fully comply due to plaintiff's failure to provide the defendants with information sufficient to identify the individual officers. Moreover, defendants have provided the names and addresses for all of the officers that responded to plaintiff's arrest and plaintiff has still not tiled an amended complaint. (*See* Aug. 1 Letter at 2.) As such, the Court determines that the failures to prosecute are wholly attributable to plaintiff.

The Court also finds that plaintiff's failures have been of significant duration. The record reflects that the last time defendants heard from plaintiff was June 29, 2007, when he sent certain documents to defendants' counsel. (*See* Aug. 1 Letter at 1-2.) The Court has not heard from plaintiff since early August 2007, when it denied plaintiff's motion for an extension of time to file an amended complaint. (*See* August 6, 2007 Order.) Plaintiff later failed to appear for the conference held on September 28, 2007, and he has since ignored the Court's orders of September 28, 2007 and April 3, 2008. Thus, the duration of plaintiff's failures is approximately nine months. **[*11]** This delay satisfies the duration prong and weighs in favor of dismissal. *See* Lyell Theatre Corp., 682 F.2d at 42-43 (noting that Rule 41 dismissal may be warranted "after merely a matter of months"); Chira v. Lockheed Aircraft Corp., 634 F.2d 664, 666 (2d Cir. 1980) (holding that dismissal was appropriate where plaintiff failed to prosecute the case for six months); *see also* Kent v. Scamardella, No 07 Civ. 844 (SHS), 2007 U.S. Dist. LEXIS 78648, 2007 WL 3085438, at *2 (S.D.N.Y. Oct. 18, 2007) ("Although three months is not necessarily a delay of 'significant duration,' . . . the delay here has functioned as a complete block to moving this litigation forward, despite the efforts of defendants and the Court to do so."); *cf.* Sease v. Doe, No. 04 Civ. 5569 (LTS) (MHD), 2006 U.S. Dist. LEXIS 81237, 2006 WL 3210032, at *4 (S.D.N.Y. Nov. 6, 2006) (holding that a one-year delay on the part of a *pro se* plaintiff, who had since been released from prison, was sufficient to merit dismissal).

2. Notice

The second element addresses whether plaintiff had notice that further delay would result in dismissal. Here, the Court's June 22, 2007 order warned plaintiff that failure to comply with the Court's orders "may result in dismissal." (June 22, 2007 Order.) **[*12]** In addition, the Court told plaintiff at the May 18, 2007 conference that "as a litigant in this courthouse you are required to tell us where you live. Otherwise, your case could get dismissed if we can't communicate with you. Ok?" (May 18. Tr. at 10.) Plaintiff responded, "Right." (*Id.*) This was reiterated in the Court's September 28, 2007 and April 3, 2008 orders as well. To the extent plaintiff has not received notice of recent activity in this case, the fault lies with plaintiff for failing to update his address with the Court. As such, the notice requirement is satisfied and weighs in favor of dismissal.

3. Prejudice

The third element requires that the Court consider the prejudice of any further delay to the defendant. Where the delay is unreasonable, prejudice may be presumed as a matter of law. *See* Shannon v. Gen. Elec. Co., 186 F.3d 186, 195 (2d Cir. 1999) (citing Lyell Theatre, 682 F.2d at 43). This is generally because "delay by one party increases the likelihood that evidence in support of the other party's position will be lost and that discovery and trial will be made more difficult." *Id.* (citing Romandette v. Weetabix Co., 807 F.2d 309, 312 (2d Cir. 1986)).

Here, plaintiff **[*13]** has offered no excuse for the delay -- indeed, the Court has not heard a word from plaintiff, much less an explanation for the delay, in months. As such, the Court finds that plaintiff's delay is unreasonable, and thereby adopts the presumption that defendants are prejudiced by the delay.

4. Balancing the Court's Calendar and the Parties' Rights

The fourth element requires an analysis of "whether the district judge has taken care to strike the balance between alleviating court calendar congestion and protecting a party's right to due process and a fair chance to be heard . . . ." LeSane, 239 F.3d at 209; *see also* Martens, 273 F.3d at 180. The Second Circuit has instructed that "[t]here must be compelling evidence of an extreme effect on court congestion before a litigant's right to be heard is subrogated to the convenience of the court." Lucas, 84 F.3d at 535-36.

Here, the Court has given plaintiff ample opportunity to be heard. After spending significant time accommodating plaintiff, it appears that plaintiff has entirely abandoned the action. As a result, the case now languishes on this Court's docket. However, as in *LeSane*, plaintiff's failure to prosecute has been "silent and unobtrusive **[*14]** rather than vexatious and burdensome." LeSane, 239 F.3d at 210. As such, there is no "extreme effect on court congestion" present here, and thus the fourth element does not strongly weigh in favor of dismissal.

5. Efficacy of Lesser Sanctions

Finally, the fifth element looks to whether the Court has adequately considered remedies other than dismissal. *See* LeSane, 239 F.3d at 209. "It is clear that a district judge should employ the remedy of dismissal 'only when he is sure of the impotence of lesser sanctions.'" Dodson v. Runyon, 86 F.3d 37, 39 (2d Cir. 1996) (citing Chira, 634 F.2d at 665).

The Court finds that the imposition of sanctions other than dismissal would not induce plaintiff's compliance with the Court's orders. The primary reason for this is that the Court has no way of locating plaintiff, who appears to have abandoned this litigation, and whose contact information on the docket is either outdated or incorrect. Moreover, prior warnings of dismissal have proved futile. As such, the Court finds that this factor also weighs in favor of dismissal.

Based on the above factors, the Court finds that dismissal pursuant to Rules 37 and 41 is appropriate. The Court is mindful of the fact **[*15]** that plaintiff is proceeding *pro se.* In recognition of that fact, the Court has attempted to give a full and fair explanation as to the reasoning behind this holding. *See* Martens, 273 F.3d at 180. This case has been pending since 2005 and still an amended complaint has not been filed by plaintiff. Courts cannot permit litigants, even those proceeding *pro se,* to conduct litigation at a snail's pace, on their own schedules and in defiance of court orders. Accordingly, the motion to dismiss is granted.

III. CONCLUSION

For the foregoing reasons, defendants' motion to dismiss the case pursuant to Rules 37 and 41 of the Federal Rules of Civil Procedure is GRANTED. The Clerk of the Court is directed to close this case.

SO ORDERED.

Dated: May 8, 2008

New York, New York

/s/ Richard J. Sullivan

RICHARD J. SULLIVAN

UNITED STATES DISTRICT JUDGE